

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
v.)
)
E.I. DU PONT DE NEMOURS & CO., INC.)
)
Defendant.)
)

CONSENT DECREE

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BACKGROUND

WHEREAS, the United States of America, at the request of the Administrator of the United States Environmental Protection Agency ("EPA"), filed a Complaint in this Court alleging that E.I. du Pont de Nemours & Company, Inc. (DuPont) violated Section 112 of the Clean Air Act (CAA), 42 U.S.C. § 7412, and the National Emission Standard for Hazardous Air Pollutants ("NESHAPs") for Offsite Waste and Recovery Operations ("OSWRO"), 40 C.F.R. Part 63, Subpart DD, promulgated pursuant to Section 112 of the Clean Air Act, 42 U.S.C. § 7412, at the DuPont Environmental Treatment, Chambers Works (DET) located in Deepwater, New Jersey;

WHEREAS, DuPont denies the alleged violations asserted in the Complaint and maintains any defenses thereto;

WHEREAS, DuPont demonstrated through documentation and reports, to the satisfaction of the United States, that it had changed its methods of receipt, sampling, management and treatment of hazardous waste in such a manner as to better assure compliance with the regulations cited in the Complaint;

WHEREAS, DuPont demonstrated through documentation and reports, to the satisfaction of the United States, compliance with its early reduction permit ("ERP") for the rolling annual period following the periods of violation referenced in the Complaint; and

WHEREAS, the United States and Dupont desire to resolve this matter without further litigation, and agree to do so through the entry of the following Consent Decree, and this Court finds by entering this Consent Decree, that the Parties have negotiated this Consent Decree in good faith, and that the settlement embodied by this Consent Decree is fair, reasonable, and in the public interest;

NOW, THEREFORE, without adjudication of any issue of fact or law or admission of the violations alleged in the Complaints, with this Consent Decree having been subject to public comment pursuant to 28 C.F.R. § 50.7 and public notice and comment under Section 113(g) of the Act, 42 U.S.C. § 7413(g),

IT IS HEREBY ORDERED AND DECREED as follows:

I. JURISDICTION

1. The Parties agree solely for the purposes of this Consent Decree that this Court has jurisdiction over the Parties and the subject matter herein pursuant to 28 U.S.C. §§ 1331, 1345, and 1355, and Section 113(b) of the Act, 42 U.S.C. § 7413(b), and that venue is proper in this district under Section 113(b) of the Act, 42 U.S.C. § 7413(b), 28 U.S.C. §§ 1391(b) and (c), and 1395(a). For purposes of this Consent Decree, DuPont waives any and all objections it may have to the Court's jurisdiction or to venue, waives service of process in accordance with the requirements set forth in the Federal Rules of Civil Procedure, and agrees to submit to the Court's jurisdiction. The Parties agree to entry of this Consent Decree by this Court.

II. APPLICABILITY AND SCOPE

2. The provisions of this Consent Decree shall apply to and be binding upon the United States on behalf of EPA. The provisions of this Consent Decree also shall apply to and be binding upon E.I. du Pont de Nemours & Company, Inc., its successors and assigns, its officers, directors, agents, and employees in their capacity as such, and upon all persons or entities acting under or for DuPont to implement the requirements of this Consent Decree.

3. No change in ownership or corporate status shall in any way alter DuPont's responsibilities under this Decree.

III. DEFINITIONS

4. Except as otherwise set forth in this Consent Decree, the terms used in this Consent Decree that are defined in the Act and/or the regulations promulgated thereunder, shall have the meanings contained therein. Whenever terms listed below are used in this Consent Decree, or in any appendix attached hereto, the following definitions shall apply:

- (a) "Act" means the Clean Air Act, as amended, 42 U.S.C. §§ 7401 et seq.;
- (b) "Complaint" means the Complaint filed by the United States in this action.
- (c) "Consent Decree" or "Decree" means this Consent Decree, including any appendices identified herein;
- (d) "Day" or "Days" means a calendar day or days. In computing any period of time under this Decree, where the final day of any period shall occur on a Saturday, Sunday, or federal holiday, the period shall run until the close of business of the next working day;
- (e) "Defendant" means DuPont, its successors and assigns, and its officers, directors, agents, and employees acting in their capacities as such;
- (f) "Effective Date" means the date of entry of this Decree by the Court after satisfaction of the public notice and comment procedures of 28 C.F.R. § 50.7 and Section 113(g) of the Act, 42 U.S.C. § 7413(g);
- (g) "EPA" means the United States Environmental Protection Agency;
- (h) "Paragraph" means a portion of this Decree identified by arabic numeral;
- (i) "Parties" means the parties to this Consent Decree—the plaintiff, United States of America, on behalf of EPA, and the defendant DuPont;

- (j) "Plaintiff" or "United States" means the United States of America, on behalf of EPA;
- (k) "Section" means a portion of this Decree identified by roman numeral.

IV. GENERAL PROVISIONS

5. Compliance with Applicable Law: Nothing in this Consent Decree shall in any way excuse DuPont from its obligations to comply with the requirements of all federal, state, or local laws, permits, and regulations. In particular, nothing in this Consent Decree relieves DuPont from the duty to comply with, or with changes in the requirements of, the OSWRO NESHAPs.

V. CIVIL PENALTY

6. Defendant shall pay to the United States, in accordance with Paragraph 7, Three Hundred and Twenty Two Thousand Dollars (\$322,000.00) as a civil penalty. That payment, together with performance of the other obligations set forth in this Decree, shall be in full settlement of the United States of America's claims for liability arising from the violations that are specifically alleged in the Complaint

7. Within 30 days of receiving notice of the lodging of this Consent Decree with the Court, Defendant shall pay a civil penalty of \$322,000.00 by certified check to the "Treasurer, United States of America," which such check shall reference USAO # 2003V00445 and shall be delivered to the office of the United States Attorney, District of New Jersey, Financial Litigation Unit, 970 Broad Street, Newark, New Jersey 07102. Defendant will simultaneously provide notice of such payment via facsimile and mail to EPA and the U.S. Department of Justice in accordance with Section XIII herein.

8. Any penalty payment made under this Section is a penalty within the meaning of

Section 162(f) of the Internal Revenue Code, 26 U.S.C. § 162(f), and is not a tax deductible expense for purposes of federal law.

VI. COMPLIANCE

9. The compliance requirements in this Consent Decree shall apply to DuPont Environmental Treatment, Chambers Works (DET) located in Deepwater, New Jersey.

10. Within thirty days of the entry of this Decree, and every ninety days thereafter, for a period of six months, Defendants shall submit to EPA a report which provides the facility's compliance status with the OSWRO NESHAPs, that includes but is not limited to the type of information specified in 40 C.F.R. § 63.697. This report shall be mailed to those specified in Section XIII (Notices) of this Decree, with copies to the attention of Kenneth Eng, Air Compliance Branch, Division of Enforcement and Compliance Assistance, and Flaire Mills, Air Branch, Office of Regional Counsel, at EPA at 290 Broadway, New York, New York 10007-1866.

11. The reporting requirements set forth in the preceding Paragraph do not relieve DuPont of its obligation to submit any other reports or information required by this Decree, the Act, or any other local, state, or federal law, the regulations promulgated thereunder, or any permit required.

12. All reports or other submissions required pursuant to this Decree shall be signed by a corporate officer or plant manager knowledgeable regarding the subject and who is authorized to sign such documents, and shall contain the following certification: "I certify under penalty of law that I have personally examined and am familiar with the information contained in or accompanying this submission; I certify that, based on my inquiry of those individuals immediately responsible for obtaining the information, the information is true, accurate, and complete."

VII. STIPULATED PENALTIES

13. In addition to any other legal remedies that are available to the United States, if DuPont fails to make timely payment of the civil penalty set forth in Section V, they shall be liable for and shall pay (i) interest for late payment as provided for in 28 U.S.C. § 1961, and (ii) a stipulated penalty in the amount of \$250 per day for each day payment is not made after the date it is due under this Consent Decree.

14. DuPont shall be liable for and shall pay a stipulated penalty for each failure to submit any reports or notices or to produce and retain any plans required by this Consent Decree per day per report, notice, or plan, as follows:

- a. 1st through 7th day after deadline - \$200 per day
- b. 8th through 15th day after deadline - \$500 per day
- c. 15th through 30th day after deadline - \$1000 per day
- d. beyond 30th day after deadline - \$2000 per day

15. DuPont shall pay all stipulated penalties under this Consent Decree upon written demand by the United States no later than thirty (30) days after DuPont receives such demand. Stipulated penalties shall be paid to the "Treasurer, United States of America," shall reference USAO # 2003V00445, and shall be delivered to the office of the United States Attorney, District of New Jersey, Financial Litigation Unit, 970 Broad Street, Newark, New Jersey 07102. Defendant will simultaneously provide notice of such payment via facsimile and mail to EPA and the U.S. Department of Justice in accordance with Section XIII herein.

16. Stipulated penalties shall accrue from the date of violation regardless of whether the United States notifies DuPont of the violations. The United States reserves the right, in its sole

discretion, to waive the stipulated penalties set out above, or any part thereof. Any stipulated penalty payment made under this Section is a penalty within the meaning of Section 162(f) of the Internal Revenue Code, 26 U.S.C. § 162(f), and is not a tax deductible expense for purposes of federal law.

VIII. FORCE MAJEURE

17. If any event occurs that causes or may cause a delay or impediment to performance in complying with any provision of this Consent Decree, DuPont shall notify the United States in writing as soon as practicable, but in any event within ten (10) business days of the time that DuPont first knew of the event or should have known of the event by the exercise of due diligence. In said notice, DuPont shall specifically reference this Force Majeure provision of this Decree and shall describe the anticipated length of the delay, the causes of the delay, and the measures taken or to be taken by DuPont to prevent or minimize the delay and the schedule by which those measures will be implemented. DuPont shall adopt all reasonable measures to avoid and minimize such delays.

18. Failure by DuPont to comply with the notice requirements of the preceding Paragraph shall render this Section voidable by the United States as to the specific event for which DuPont have not complied with such notice requirement, and, if voided, this Section shall be of no effect as to the particular event involved.

19. The United States shall notify DuPont in writing regarding any claim by DuPont of a delay or impediment to performance within thirty (30) days of receipt of a notice of force majeure under this Section. If the United States agrees that the delay or impediment has been or will be caused by circumstances beyond the control of DuPont, and that DuPont could not have prevented the delay by the exercise of due diligence, the Parties shall stipulate to an extension of the required deadline(s) for the requirement(s) affected by the delay for a period equivalent to the delay caused

or expected to be caused by the circumstances in question. Such stipulation shall be filed as a modification to this Consent Decree pursuant to Section XV. DuPont shall not be liable for stipulated penalties for the period of any such delay.

20. If the United States does not accept DuPont's claim of delay or impediment to performance, in order to avoid stipulated penalty liability under this Decree, DuPont must submit the matter to the Court for resolution. Once DuPont have submitted the matter to the Court, the United States shall have forty five (45) business days to file its response to DuPont's petition. If the Court determines that the delay or impediment to performance has been or will be caused by circumstances beyond DuPont's control, and that DuPont could not have prevented the delay by exercise of due diligence, DuPont shall be excused as to the event(s) in question, and shall not be liable for stipulated penalties, for the period of the delay caused by such event(s).

21. DuPont shall bear the burden of proof with regard to (1) any claim that the delay or impediment in question has been or will be caused by circumstances beyond DuPont's control, (2) any claim that DuPont could not have prevented the delay by exercise of due diligence, and (3) any assertion regarding the duration and extent of delay attributable to a claimed force majeure event. Unanticipated or increased costs or expenses associated with the performance of DuPont's obligations under this Consent Decree shall not constitute a force majeure event under this Section.

22. As part of the resolution of any matter submitted to the Court under this Section VIII, the Parties by agreement, or by order of the Court, may in appropriate circumstances extend or modify other schedules under this Consent Decree to account for the delay that occurred as a result of any delay or impediment to performance agreed to by the United States or approved by this Court.

IX. DISPUTE RESOLUTION

23. Except where otherwise expressly provided by this Consent Decree, the dispute resolution procedures of this Section shall be available to resolve all disputes that may arise under or with respect to this Consent Decree.

24. Any dispute which arises under or with respect to this Consent Decree shall in the first instance be the subject of informal negotiations which shall not exceed thirty (30) days from the time the dispute arises, unless agreed to in writing by the Parties. A dispute shall be considered to have arisen when one party sends the other party a written "Notice of Dispute."

25. In the event the Parties cannot resolve a dispute through informal negotiations under the preceding Paragraph, any party may invoke formal dispute resolution by filing with the Court and serving on the other party a "Notice of Judicial Appeal" setting forth the matter in dispute, the efforts made by the Parties to resolve the matter, the relief requested, and the schedule, if any, within which the dispute must be resolved to ensure orderly implementation of this Decree. A response to the filing of any such Notice of Judicial Appeal shall be filed and served on the other party within sixty (60) days of receipt of such Notice of Judicial Appeal.

26. The invocation of formal dispute resolution under this Section shall not extend, postpone, or affect in any way any of DuPont's obligations under this Decree not directly in dispute, unless the Court finds otherwise. Except as to disputes concerning stipulated penalties as to which Paragraph 16 shall apply, any stipulated penalties applicable to disputed matters shall continue to accrue, but payment shall be stayed, pending resolution of the dispute. If DuPont does not substantially prevail on a disputed issue as to which stipulated penalties are applicable under this Decree, such stipulated penalties shall be assessed and paid as provided in Section VII.

27. As part of the resolution of any dispute submitted to dispute resolution, in appropriate circumstances the Parties may agree, or this Court may order, an extension or modification of the schedules under this Consent Decree to account for the delay that occurred as a result of the dispute resolution.

X. EFFECT OF SETTLEMENT

28. The United States of America covenants not to sue DuPont for civil penalties or injunctive relief arising from the violations specifically alleged in the Complaint. This covenant not to sue extends only to the DuPont, and does not extend to any other person. This covenant not to sue regarding civil penalties is effective upon payment of the penalty as provided in Section V (Civil Penalty), and as to injunctive relief is effective upon compliance with the requirements of Section VI (Compliance) of this Consent Decree.

29. The Court enters this Consent Decree as a final judgment under Rules 54 and 58 of the Federal Rules of Civil Procedure.

XI. RESERVATION OF RIGHTS

30. Nothing in this Consent Decree is intended to be, nor shall it be construed as, a release from liability or a covenant not to sue for any claim or cause of action, administrative or judicial, for:

- a. any liability for violations other than those alleged in the Complaint; and
- b. any criminal liability.

31. Nothing in this Consent Decree shall be construed as relieving DuPont of the obligation to comply with provisions of the Act, the OSWRO NESHAPs, or any other federal, state, or local law. Except as expressly provided in this Consent Decree, nothing in this Consent Decree

shall limit the remedies available to the United States for any violations by DuPont of the law. This Consent Decree does not constitute a permit.

XII. COSTS

32. The Parties shall each bear their own costs of litigation of this matter, including attorneys' fees.

XIII. NOTICES

33. Unless otherwise specified herein, whenever notifications or communications are required by this Consent Decree, they shall be made in writing and directed to the individuals at the addresses specified below, unless those individuals or their successors give written notice of a change. All notices and submissions shall be considered effective upon receipt, unless otherwise provided.

As to the United States Department of Justice:

Chief, Environmental Enforcement Section
Environmental and Natural Resources Division
U.S. Department of Justice
P.O. Box 7611
Washington, D.C. 20044

As to EPA:

Chief, Air Compliance Branch
Division of Enforcement and Compliance Assurance
U.S. Environmental Protection Agency
290 Broadway
New York, New York 10007-1866

As to DuPont:

Bernard Reilly, Esq., Corporate Attorney
1002 Market Street
Wilmington, Delaware 19898

XIV. RETENTION OF JURISDICTION

34. This Court shall retain jurisdiction over both the subject matter of this Decree and the Parties for the duration of the performance of the terms and provisions of this Decree for the purpose of enabling any of the Parties to apply to this Court at any time for such further order, direction, and relief as may be necessary or appropriate for the construction or modification of this Decree, or to effectuate or enforce compliance with its terms, or to resolve issues of *force majeure* or other disputes in accordance with Section VIII (Force Majeure) or Section IX (Dispute Resolution).

XV. MODIFICATION

35. The terms of this Decree may be modified only by a subsequent written agreement signed by all Parties and approved by the Court as a modification to this Decree.

XVI. EFFECTIVE DATE

36. The Effective Date of this Decree is the date upon which it is entered by the Court.

XVII. TERMINATION

37. This Consent Decree shall terminate after DuPont satisfies all requirements of this Consent Decree, including payment of the civil penalty, payment of all stipulated penalties that may be due, and submission of the operation and maintenance plans and the quarterly summary reports as called for in Section VI of this Consent Decree.

38. If DuPont believes that it has achieved compliance with the requirements of this Consent Decree, then DuPont shall so certify to the United States. Unless the United States objects in writing with specific reasons within 60 days of receipt of DuPont's certification, the Consent Decree shall be terminated. If the United States objects to DuPont's certification, then the matter

shall be submitted to the Court for resolution under Section IX of this Consent Decree. In such case, DuPont shall bear the burden of proving that this Consent Decree should be terminated.

XVIII. PUBLIC PARTICIPATION

39. The Parties agree that, in accordance with 28 C.F.R. § 50.7, notice of the Consent Decree will be published in the Federal Register to allow the public to comment on the terms of the Consent Decree. The United States reserves the right to withdraw or withhold its consent based upon review of any public comments if such comments disclose facts or considerations which indicate that such consent is inappropriate, improper, or inadequate, in which case the Consent Decree shall be null and void and shall not be admissible in evidence or be utilized for any other purpose by United States of America or DuPont. After the public comment period is concluded, the United States shall, if appropriate, inform DuPont within thirty days that public comment has provided no basis for cancellation or revocation of this Consent Decree, and the United States shall request that the Court enter it forthwith.

XIX. SIGNATORIES

40. The undersigned representatives of DuPont and United States of America certify that they are fully authorized to enter into the terms and conditions of this Consent Decree and to execute and legally bind such party to this document.

XX. SERVICE OF PROCESS

DuPont shall identify on the attached signature page the name and address of an agent who is authorized to accept service of process by mail on DuPont's behalf with respect to all matters arising under or relating to this Consent Decree. DuPont hereby agrees to accept service in that manner and to waive the formal service requirements set forth in Rule 4 of the Federal

Rules of Civil Procedure and any applicable local rules of this Court, including, but not limited to, service of a summons. By entering into this Decree, DuPont agrees to waive all service of process requirements for the Complaint filed contemporaneously with this Decree.

**JUDGMENT IS HEREBY ENTERED IN ACCORDANCE WITH THIS
CONSENT DECREE THIS _____ DAY OF _____, 2006.**

UNITED STATES DISTRICT JUDGE

FOR THE UNITED STATES OF AMERICA:

Date: _____

ELLEN MAHAN
Deputy Chief
Environmental Enforcement Section
Environmental and Natural Resources Division
U.S. Department of Justice

CHRISTOPHER J. CHRISTIE
United States Attorney
District of New Jersey

Date: _____

JAMES B. CLARK III
Assistant United States Attorney
970 Broad Street, Suite 700
Newark, New Jersey 07102
(973) 645-2700

FOR THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY:

Date: _____

ERIC SCHAAF
Regional Counsel
Region 2
U.S. Environmental Protection Agency

Date: _____

FLAIRE HOPE MILLS
Air Branch Chief
Office of Regional Counsel, Air Branch
290 Broadway
New York, New York

FOR E.I. DUPONT DENEMOURS & CO., INC.:

Date: 11/15/06

[Insert]

JOHN D. STRAIT
PLANT MANAGER
E.I. DUPONT
CHAMBERS WORKS FACILITY

Agent Authorized to Accept Service of Process for E.I. DuPont De Nemours & Co., Inc.:

